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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 492

FOX RIVER PAPER COMPANY, PATTEN PAPER COMPANY, LIMITED; APPLETON WOOLEN MILLS, ET AL., PLAINTIFFS IN ERROR,

vs.

RAILROAD COMMISSION OF WISCONSIN

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JULY 8, 1926

(32,059)

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[fol. 1] **IN SUPREME COURT OF WISCONSIN**

WRIT OF ERROR—Filed June 4, 1926

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Wisconsin before you or some of you, being the highest court of law or equity of the said state of Wisconsin, in which a decision could be had in the suit between Fox River Paper Company, the Patten Paper Company Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company, plaintiffs and appellants vs. Railroad Commission of Wisconsin, Defendant and Respondent, and wherein was drawn in question the validity of certain statutes of said State of Wisconsin and also of an authority exercised under said statutes on the ground of their being repugnant to the constitution and laws of the United States and the decision was in favor of their validity, and wherein rights, privileges and immunities were claimed under the Constitution of the United States and the decision was against a right, privilege and immunity specially set up and claimed under the Constitution of the United States, a manifest error hath happened to the great damage of the Fox River Paper Company, the Patten Paper Company, Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company, as by its petition appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and procedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

[fol. 2] the same in said Supreme Court at Washington, D. C., within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States this 4th day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-six (1926).

H. C. Hale, Clerk of the District Court of the United States for the Western District of Wisconsin. H. C. Hale. (Seal of U. S. District Court, Western Dist. of Wisconsin, Madison.)

Allowed by me this 4 day of June, 1926. A. J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal of Supreme Court of Wisconsin.)

STATE OF WISCONSIN, ss:

SUPREME COURT

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 3] [File endorsement omitted.]

[fol. 4] IN SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF ERROR—Filed June 4, 1926

To the District Court of the United States for the Western District of Wisconsin:

The petition of Fox River Paper Company, The Patten Paper Company Limited, The Appleton Woolen Mills, The Appleton Machine Company, The Valley Iron Works, and The Appleton Manufacturing and Lumber Company, respectfully shows:

That petitioners are the owners of an existing dam across the Fox River at the city of Appleton, Outagamie County, Wisconsin, which dam was built in 1878 and has been maintained ever since, and that petitioners on the 21st day of May, A. D. 1925, presented to the Railroad Commission of Wisconsin their application for a permit to rebuild, maintain and operate said dam under Section 31.07 of the Wisconsin Statutes.

That thereafter and on the 25th day of May, A. D. 1925, said Railroad Commission of Wisconsin refused to entertain said petition on the ground that it was without jurisdiction to entertain the same and dismissed said application without prejudice on the ground that the proposal required under Subsec. (3) of Section 31.09, Wisconsin Statutes was omitted therefrom.

That thereafter petitioners duly commenced an action in the Circuit Court for Dane County, Wisconsin, against said Railroad Commission of Wisconsin, in which they asked judgment of the said court directing said Railroad Commission of Wisconsin to take jurisdiction of said application and fix a time for a public hearing thereon and to proceed to a final determination as provided by the statutes of said state of Wisconsin, and that said Railroad Commission of Wisconsin, in its answer to the complaint of petitioners, alleged that petitioners did not file with said application the proposal required under Subsec. (3) of Section 31.09, Wisconsin Statutes, and that therefore said application did not state facts sufficient to give jurisdiction to the Railroad Commission of Wisconsin, and that a demurrer to said answer was interposed by the petitioners and that said demurrer was overruled by said Circuit Court for Dane County, and judgment was entered by said Circuit Court [fol. 5] for Dane County dismissing the complaint of petitioners.

That thereafter an appeal from said judgment of the Circuit Court for Dane County, Wisconsin, was taken to the Supreme Court of Wisconsin, where the judgment of the Circuit Court for Dane County, Wisconsin was affirmed.

That petitioners maintain that the Supreme Court of the State of Wisconsin erred in holding that Subsec. (3) of Section 31.09 Wisconsin Statutes for 1925 is valid, the validity of said Subsection having been denied and drawn

in question by petitioners in their complaint in said action against the Railroad Commission of Wisconsin on the ground that it was repugnant to the constitution of the United States, and that said Subsection is in violation of Article V of the Constitution of the United States and that under the provisions of said Subsection, petitioners are deprived of property without due process of law in violation of Section 1, Article XIV of the Constitution of the United States.

Wherefore petitioners pray that a Writ of Error may issue from this court directed to the Supreme Court of the State of Wisconsin directing that all the records and proceedings in the Supreme Court of the State of Wisconsin be transmitted to the Supreme Court of the United States so that the Supreme Court of the United States may take such proceedings as may be necessary to correct such error according to the laws and customs of the United States.

John F. Kluwin, Attorney for Fox River Paper Company, the Patten Paper Company, Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company. Moses Hooper, of Counsel.

[fol. 6] [File endorsement omitted.]

[fol. 7] IN SUPREME COURT OF WISCONSIN

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, Limited, The Appleton Woolen Mills, The Appleton Machine Company, The Valley Iron Works, and The Appleton Manufacturing and Lumber Company, Plaintiffs and Appellants,

vs.

RAILROAD COMMISSION OF WISCONSIN, Defendant and Respondent

ORDER ALLOWING WRIT OF ERROR—Filed June 4, 1926

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Wisconsin, in rendering judgment against them in the above entitled case, the plain-

tiffs and appellants hereby pray a Writ of Error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

Assignments of error are herewith presented and filed.

John F. Kluwin, Attorney for Fox River Paper Company, the Patten Paper Company, Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company. Moses Hooper, of Counsel.

STATE OF WISCONSIN, ss:

SUPREME COURT

Let the Writ of Error issue upon the execution of a bond by Fox River Paper Company, the Patten Paper Company, [fol. 8] Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company to the Railroad Commission of Wisconsin, in the sum of One Thousand Dollars; such bond when approved to act as a supersedeas.

Dated this fourth day of June, A. D. 1926.

A. J. Vinje, Chief Justice of Supreme Court of Wisconsin. (Seal of the Supreme Court of Wisconsin.)

[fols. 9-11] [File endorsement omitted.]

[fol. 12] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 4, 1926

Now come the above plaintiffs and file herewith their petition for a Writ of Error and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignments:

1. The Supreme Court of the State of Wisconsin erred in holding that sub-section 3 of section 31.09 of the Statutes of Wisconsin of 1925 is valid. The validity of said section was denied and drawn in question by plaintiffs on the ground that it was repugnant to the Constitution of the United States and in contravention thereof.

2. That the Supreme Court of the State of Wisconsin erred in holding and deciding that said section does not violate Article V of the Constitution of the United States.

3. That the Supreme Court of the State of Wisconsin erred in holding that said section does not deprive the plaintiffs of property, without due process of law as guaranteed by section I of Article XIV of the Constitution of the United States.

[fol. 13] 4. The Supreme Court of Wisconsin erred in affirming the decision of the Circuit Court of Dane County, Wisconsin, in failing to reverse said decisions with directions to said court to enter judgment according to the prayer of plaintiffs' complaint.

For which errors, the plaintiffs, Fox River Paper Company, The Patten Paper Company Limited, The Appleton Woolen Mills, The Appleton Machine Company, The Valley Iron Works, and The Appleton Manufacturing and Lumber Company, pray that the said judgment of the Supreme Court of the State of Wisconsin, rendered herein on the 6th day of April, A. D. 1926, be reversed, and a judgment be rendered in favor of the plaintiffs herein and for costs.

John F. Kluwin, Attorney for Fox River Paper Company, the Patten Paper Company, Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company. Moses Hooper, of Counsel.

[fols. 14-23] [File endorsement omitted.]

[fol. 24] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, Limited, The Appleton Woolen Mills, The Appleton Machine Company, The Valley Iron Works, and The Appleton Manufacturing and Lumber Company, Plaintiffs,

vs.

RAILROAD COMMISSION OF WISCONSIN, Defendants

BILL OF COMPLAINT—Filed January 16, 1926

Plaintiffs complain of defendant for this, that

On May 13, 1925, plaintiffs presented to the Railroad Commission, defendants, their application, of which a copy is hereto annexed marked Exhibit A, for a certificate that the construction, operation and maintenance of the so-called Middle Dam across the Fox River in the City of Appleton does not materially obstruct existing navigation, or violate other public rights, and will not endanger life, health or property, and will not do so if rebuilt according to the plans and specifications made a part of said application, all the allegations of which application are true.

On May 15, 1925, said Railroad Commission adjudicated respecting said application:

"From an examination of the application and from other investigations hereinafter pointed out, the Commission finds:

That the application states the facts required to be stated under Section 31.13, except those required by subsection (b) thereof, namely, 'If constructed by legislative permission, a statement of the act of the legislature authorizing the same.' In fact, the application under Subdivision (e) affirmatively shows that the dam was built without any legislative authority. It moreover appears from the records in the office of the Commission, as well as from an examination of the acts of the State Legislature of Wisconsin since the organization of the state that the dam in question was built without legislative permission, was never legalized under Section 31.07 or under any other provision

of law, but that on the contrary it has existed since its construction and still exists as an illegal structure.

That the application does not state facts sufficient to give jurisdiction to the Commission to issue a permit to the [fol. 25] applicant under Section 31.13 of the Statutes.

The Commission further finds that the application also states the facts required to be stated under Section 31.05 of the statutes for a permit to construct a dam, but does not comply with the further requirement of the statutes that each applicant for a permit under Section 31.05 of the statutes shall file with his application for a permit the proposals under Subdivision (1), (2) and (3) of Section 31.09, in that the proposal required under Subsection (3) of Section 31.09 is omitted.

That the application does not comply with the requirements of the statutes so as to give jurisdiction to the Commission to issue a permit to construct a dam under Section 31.05 for the reason that the applicants have not fully complied with Subsection (3) of Section 31.09 of the statutes.

The Commission further finds that it is without jurisdiction to entertain the application.

It is therefore ordered that the application be and the same is hereby dismissed without prejudice."

On May 21, 1925, plaintiffs renewed their said application in the following language, to-wit:

"To the Honorable the Railroad Commission of Wisconsin:

Now come the applicants, by their attorneys and counsel, and renew the application filed with you on May 13, 1925, with the understanding that it is for a permit to operate and maintain an existing dam under Section 31.07 of the Statutes of Wisconsin.

May 20, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys for Applicants. Moses Hooper, of Counsel."

On May 25, 1925, said Railroad Commission reexamined the application and found and determined

"that the application states the facts required to be stated under section 31.07, Statutes, for an application for a permit to operate and maintain an existing dam which was constructed in or across a navigable stream without leg-

islative authority, but that the application does not comply with the further requirements of the statute that each applicant for such permit shall file with his application the proposals under subdivisions (1), (2) and (3) of section 31.09, in that the proposal required under subsection (3) of said section 31.09 is omitted therefrom.

Hence the Commission finds that it is without jurisdiction to entertain the application.

It is therefore ordered that the application be and the same is hereby dismissed without prejudice."

By such adjudication and determination of the defendant, and its refusal to proceed to a public hearing upon such application as provided by Statute, or to take evidence in respect to the same, these plaintiffs are deprived of the legal and proper use of their said water power in violation of [fol. 26] Article V of the Federal Constitution which provides that

"No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation,"

and in violation of the provisions of the XIV amendment of the Federal Constitution expressed in the following words:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"

and in violation of the 13th section of Article I of the State Constitution, which provides that "the property of no person shall be taken for public use without just compensation therefor."

Wherefore these plaintiffs pray judgment of this Court directing the said Railroad Commission to take jurisdiction of such application and fix a time and place for a public hearing thereon, and proceed thereon to final determination as provided by the Statutes of Wisconsin.

Dated July 10th, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys for Plaintiffs. Moses Hooper of Counsel.

[fol. 27] EXHIBIT A TO BILL OF COMPLAINT

Filed Jan. 16, 1926. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

BEFORE THE WISCONSIN RAILROAD COMMISSION

In the Matter of the Application of THE FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON WOOLEN MILLS, THE APPLETON MACHINE COMPANY, THE VALLEY IRON WORKS, and THE APPLETON MANUFACTURING AND LUMBER COMPANY for Permission to Rebuild, Operate, and Maintain the So-called Middle Dam

To the Honorable the Railroad Commission of Wisconsin:

The Fox River Paper Company, the Patten Paper Company Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works and the Appleton Manufacturing and Lumber Company, all Wisconsin corporations, hereby make application for permission, pursuant to the provisions of Chapter 31 of the Wisconsin Statutes of 1923, to rebuild, operate and maintain the so-called Middle Dam.

For the purpose of this application, said corporations, petitioners, respectfully show to your Honorable Body that

(a) This dam is constructed in and across the Fox River extending from the head of Grand Chute Island in Section 35 south of the river, Town 21 North of Range 17 East, of the Fourth Principal Meridian, to Lot 2 in Section 26, said Town and Range, north of the river.

(b) Your applicant, the Fox River Paper Company, is the owner of the land on which said dam rests on both sides of the river and of the land below the same on which it is the purpose of your petitioners to rebuild said dam.

(c) The original dam was built in the year 1877 and completed in the year 1878 and as said dam was built and as the same has since been maintained and operated, it raises the level of the water in the pond above said dam in ordi-

nary stages to the point 721.37 feet above mean low tide [fol. 28] at New York City.

(d) The total length of said dam is 373 feet 4 inches. The overflow section is 91 feet 6 inches long. The crest thereof is elevation 721.37 feet above mean tide at New York City. There are in the same eleven sluiceway sections, each approximately 21 feet wide. The bottom elevation of each of which is approximately 4 feet 8 inches below the crest of the dam. Said sluiceways are operated by needles. The elevation of the crest of said dam referring to bench mark 60 B elevation 100, as fixed by the Railroad Commission on June 28, 1918, is 77.16 feet. Top of piers between the sluiceways two feet above the water surface, or 723.37 feet above mean low tide or 79.16 feet referring to bench mark 60 B elevation 100 as fixed by the Railroad Commission on June 28, 1918. This is a stone and wood crib dam.

The length of the dam to be rebuilt to replace this dam is intended to be 365 feet between abutment walls and 373 feet 4 inches including abutment walls. The crest of same is intended to be 721.37 feet above mean low tide at New York City. There are to be 16 sluiceways, each 20 feet wide. The elevation of the crest of the bottom of such sluiceways is intended to be 711.37 feet datum elevation mean tide at New York City, or 67.16 feet referring to bench mark 60 B elevation 100, as fixed by the Railroad Commission on June 28, 1918. It is intended to build same of solid concrete, elevation of top of piers between sluiceways two feet above the water surface, or 723.37 feet above mean low tide, or 79.16 feet referring to bench mark 60 B elevation 100, as fixed by the Railroad Commission on June 28, 1918. Head to be held at the dam about 8 feet, but a head of about 10 feet is made available by a headrace running down through Grand Chute Island.

(e) Said dam was originally built and has been ever since maintained as a mill dam for the purpose of furnishing hydraulic power for manufacturing purposes and is intended for such purpose in the future as rebuilt.

Same was built by the Appleton Water Power Company, said company supposing that it had authority from the State to build the same through its charter from the [fol. 29] State. The Articles of Association of said Apple-

ton Water Power Company recited as the object of its incorporation—

"First. The purpose for which this organization is formed is to construct a dam across the Fox river in the said city of Appleton and for improving and creating water powers, and river lots, on and near said water power and for holding and disposing of the same."

Its charter recited that—

"Whereas T. W. Brown, N. M. Edwards, Joseph H. Marston, Jackson Tibbits, Edward West and S. K. Wambold, have filed in the office of the secretary of state certain articles of association with a view to forming a corporation to be known as the Appleton Water Power Company and with a capital of twelve thousand dollars, for the purpose of constructing a dam across the Fox river in the city of Appleton, and for improving and creating water powers, river lots on and near said water power, and holding and disposing of the same, and have complied with the provisions of the statutes in such case made and provided, the state of Wisconsin does hereby grant unto the above named persons and their successors and assigns, full authority by and under their said name of Appleton Water Power Company to exercise the powers and privileges of a corporation for the purpose above stated and in accordance with their said articles of association and the laws of the state."

(f) The approximate amount of hydraulic power as developed by said dam is, at the ordinary stage of water, about 1500 horse power—more in a high stage of water and less in a low stage of water.

(g) The nearest city or village above said dam is the twin cities of Neenah and Menasha in the County of Winnebago, each of which is about five miles above the dam in question by way of the river, one of said cities being on one side of the river and the other of said cities being on the other side of the river.

The nearest city or village below said dam is the Village of Kimberly, which is by the course of the river about five miles below said dam.

The nearest existing dam across the Fox River above said dam is what is called the Grand Chute Dam, a large part of which is owned and maintained by the United

States, and a small part of which is owned and maintained by riparian owners, and which is about two thousand feet above the dam in question. Said dam lands on Lot 2 of Section 35, Town 21 North of Range 17 East of the Fourth Principal Meridian on the north side of the river and on [fol. 30] Lots 3 and 4 of said Section 35 on the south side of the river.

The nearest existing dam below said dam on said river is called the Telulah Dam. This dam is owned and maintained by the United States and is about four thousand feet below the dam in question by way of the river and reaches from Lot 1 Section 36 Town 21 North of Range 17 East of the Fourt- Principal Meridan on the south side of the river to a fraction of said Section 36 north of the river.

(h) Attached hereto and made a part of this application is a map on the scale of 250 feet to the inch showing the lands that may be affected by the rebuilding and enlargement and operation and maintenance of said dam and indicating the ownership of each tract of land that may be so affected.

(i) Said dam is weak from age and decay. Safety requires rebuilding or extensive repairs. Rebuilding by use of concrete seems preferable. If the dam is rebuilt, economy requires that the rebuilding be on a site twenty-five or fifty feet below the present site in order that the old dam may be available as a coffer dam.

(j) The rebuilding and enlargement of said dam in accordance herewith will not materially obstract navigation or violate other public or private rights or endanger life, health or property.

(k) At the site of said dam, the owners of the power on the south or east side of said river are entitled to draw for use for power the four-sevenths of the surplus flow of said river, after the withdrawal therefrom of the volume thereof required for navigation. See West vs. Fox River Paper Company, 82 Wis. 647, 654-5-6-7.

(l) (c. m. f. means cubic feet per minute). Your petitioners own and are entitled to draw for use for power from the pond held by said dam, subject to right to use for navigation, as follows:

The Appleton Woolen Mills is entitled to draw 2,974 c. m. f. when there is flowing in said river 10,112 c. m. f. and 1,487 c. m. f. more when there is flowing in said river 23,066 c. m. f. and 743 c. m. f. more when there is flowing in said river 162,770 c. m. f. and 1,112 c. m. f. more when there is flowing in said river 231,560 c. m. f.

[fol. 31] The Appleton Machine Company is entitled to draw 1,770 c. m. f. when there is flowing in said river 3,097 c. m. f. and 1,770 c. m. f. more when there is flowing in said river 13,709 c. m. f. and 885 c. m. f. when there is flowing in said river 15,257 c. m. f.

The Valley Iron Works is entitled to draw 2,975 c. m. f. when there is flowing in said river 167,975 c. m. f.

The Appleton Manufacturing and Lumber Company is entitled to draw 1,667 c. m. f. when there is flowing in said river 229,614 c. m. f.

Of the remaining flow of the water, your petitioner, Patten Paper Company, Limited, is entitled to the 69½% thereof and your petitioner, Fox River Paper Company is entitled to the 37½% thereof. See Kimberly-Clark Company vs. Patten Paper Company, 153 Wis., 69.

(m) The volume of the flow of the Fox River at the point of location of this dam is largely modified, increased or diminished, by the handling of the navigation storage basin of Lake Winnebago by the War Department of the United States in the interest of navigation.

(n) There is under consideration a proposition of the War Department to largely increase the flow of the river at the location of this dam by a plan for handling the storage of Lake Winnebago in the interests of navigation, conditioned that the Water Power Interests on the Lower Fox River will furnish a very considerable sum either as a principal sum or as an annual rental for such increased flow of water. If such plan is acted upon and carried out, it will very largely increase the flow of the river at the point of this dam, and thereby very largely increase the value of those parcels of water to be drawn for power under conditions of the larger flow of the water, while the same will not be at all to the advantage of those parties entitled to draw water for power under conditions of smaller flow. See



FOLD OUT IS TOO LARGE TO BE FILMED

House Doc. 146, 67th Congress, Second Session, pages 138 [fol. 32] to 141 inclusive.

Fox River Paper Company, (Sgd.) by Wm. C. Wing, President. Patten Paper Company, Limited, (Sgd.) by Juelson T. Rosebush, President. Appleton Woolen Mills, (Sgd.) by F. H. Haywood, President. (Sgd.) Appleton Machine Company, (Sgd.) by F. E. Saecker, President. Valley Iron Works, (Sgd.) by E. A. Peterson, President. Appleton Manufacturing and Lumber Company, (Sgd.) by E. P. Grigson, President.

[fol. 33] STATE OF WISCONSIN,
Outagamie County, ss:

W. C. Wing, being duly sworn, on his oath deposes and says that he is the President of the Fox River Paper Company, one of the applicants for permit as stated in the foregoing application. That he has read the foregoing application and knows the contents thereof. That each and every of such allegations is true as he is credibly informed and verily believes.

That the Fox River Paper Company is the owner in fee of the land on which petitioners ask to rebuild the dam referred to in such application.

Wm. C. Wing.

Subscribed and sworn to before me this 6 day of May, 1925. A. F. Kletzien, Notary Public, Outagamie County, Wisconsin. Commission expires Mar. 6, 1927. (Notarial Seal.)

(Here follow map showing property owners on upper level at middle dam and plans for rebuilding of middle dam, marked side folio pages 34 and 35.)

[fols. 36-39] STATE OF WISCONSIN:

BEFORE THE WISCONSIN RAILROAD COMMISSION

[Title omitted]

Now come the Fox River Paper Company, the Patten Paper Company Limited, the Appleton Woolen Mills, the Appleton Machine Company, the Valley Iron Works, and the Appleton Manufacturing and Lumber Company, being the applicants in the foregoing application for a permit to rebuild, operate and maintain the dam mentioned in such application, and to secure such permit, they and each of them does propose and agree

(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicants or not.

(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, maintained, and operated and used and useful under the permit.

Fox River Paper Company, by Wm. C. Wing, President. Patten Paper Company Limited, by Judson G. Rosebush, President. Appleton Woolen Mills, by F. H. Harwood, President. Appleton Machine Company, by F. E. Saecker, President. Valley Iron Works, by E. A. Peterson, President. Appleton Manufacturing and Lumber Company, by E. P. Grignon, President.

[fol. 40] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ANSWER.—Filed in Circuit Court November 13, 1925; in Supreme Court January 16, 1926

Now comes the above-named defendant by Herman L. Ekern, Attorney General, C. A. Erikson, Deputy Attorney

General, Suel O. Arnold, Assistant Attorney General, its attorneys, and for answer to the complaint of the plaintiff admits, denies, and alleges as follows:

1. Defendant admits that on May 13, 1925, plaintiffs presented to the defendant Railroad Commission their application for a permit to construct, operate, and maintain the so called, middle dam in the Fox River under the provisions of Chapter 31 of the Statutes.

2. Defendant admits that on May 15, 1925, it dismissed the plaintiff's application.

3. Defendant admits that on May 21, 1925, the plaintiffs renewed their application.

4. Defendant admits that on May 25, 1925, it again dismissed the plaintiff's application.

5. Defendant denies that by reason of its refusal to proceed to a public hearing upon the said applications the plaintiffs are deprived of the legal and proper use of their said water power in violation of Article V of the Constitution [fol. 41] of the United States.

6. Defendant denies that by reason of its refusal to proceed to a public hearing upon the said applications the plaintiffs are deprived of the legal and proper use of their said water power in violation of the provisions of the XIV amendment to the federal constitution.

7. Defendant denies that by reason of its refusal to proceed to a public hearing upon the said applications the plaintiffs are deprived of the legal and proper use of their said water power in violation of Section 13 of Article I of the Constitution of the State of Wisconsin.

8. Further answering said complaint defendant alleges that said application, dated May 13, 1925, states facts required to be stated under section 31.13 of the Stats. for a permit to raise or enlarge an existing dam, except those required by subsection (b) thereof, namely, "If constructed by legislative permission, a statement of the act of the legislature authorizing the same." That said application in subsec. (c) thereof affirmatively shows that the dam was constructed without legislative authority. That the records in the office of the said defendant Railroad Commission

shows that said dam was constructed without legislative authority. That said dam was never legalized under the provisions of law. That said dam was at the time it was constructed, and still is, an unlawful structure. That said application does not state facts sufficient to give jurisdiction to the defendant Railroad Commission to issue a permit under said sec. 31.13 of the Statutes, or under any other provision of law.

9. Further answering said complaint defendant alleges that the said application, dated May 13, 1925, states the facts [fol. 42] required to be stated under sec. 31.05 of the Stats. for a permit to construct a dam but does not comply with the further requirement of the Statutes that each applicant for a permit under sec. 31.05 of the Stats. shall file with his application for a permit the proposals under subsec. (1), (2), and (3) of sec. 31.09 of the Stats., in that the proposal required under subsec. (3) of sec. 31.09 is omitted. That the said application does not state facts sufficient to give jurisdiction to the Railroad Commission to issue a permit under said sec. 31.05 of the Stats., or under any other provision of law.

10. Further answering said complaint defendant alleges that the said application, dated May 21, 1925, states the facts required to be stated under sec. 31.07 of the Stats. for a permit to operate and maintain an existing dam constructed in or across a navigable stream without legislative authority but does not comply with the further requirement of the Statutes that each applicant for a permit under sec. 31.07 of the Stats. shall file with his application the proposals under subsec. (1), (2), and (3) of sec. 31.09 in that the proposal required under subsec. (3) of said sec. 31.09 is omitted. That the said application does not state facts sufficient to give jurisdiction to the Railroad Commission to issue a permit under said sec. 31.07 of the Stats., or under any other provision of law.

11. Further answering said complaint, defendant denies that the action of the Railroad Commission complained of by the plaintiff is unlawful, unjust, or unreasonable, and alleges that the said action of the Railroad Commission was in all respects lawful, just, and reasonable.

[fols. 43 & 44] 12. Further answering said complaint defendant denies every allegation, matter and fact therein contained not hereinbefore specifically admitted, qualified or denied.

Wherefore defendant demands judgment that the plaintiff's complaint be dismissed with costs.

Herman L. Ekern, Attorney General; C. A. Erikson, Deputy Attorney General; Suel O. Arnold, Assistant Attorney General, Attorneys for Defendant, Railroad Commission of Wisconsin.

[fols. 45-51] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

DEMURRER TO ANSWER—Filed in Circuit Court November 10, 1925; in Supreme Court January 16, 1926

Now come the plaintiffs herein and demur to the answer of the defendant herein on the ground that upon the face thereof the said answer does not state facts sufficient to constitute a defense herein.

October 13, 1925.

Bouck, Hilton, Kluwin & Dempsey, Plaintiffs' Attorneys. Moses Hooper, of Counsel.

[fols. 52-56] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER TO ANSWER—Filed in Circuit Court December 31, 1925; in Supreme Court January 16, 1926

The issue of law raised herein upon the demurrer of the plaintiff to the defendant's answer coming on to be heard at said term on the 13th day of November, 1925, and after hearing Edward J. Dempsey and Moses Hooper, plaintiffs'

attorneys, in support of said demurrer, and C. A. Erikson, Deputy Attorney General, and Suel O. Arnold, Assistant Attorney General, in opposition thereto, and being advised in the premises;

It is ordered that said demurrer be, and the same is hereby overruled.

Dated December 31st, 1925.

By the court.

E. Ray Stevens, Judge.

[File endorsement omitted.]

[fols. 57-65] In Circuit Court of Dane County

[Title omitted]

Judgment—Filed in Circuit Court January 2, 1926; in Supreme Court January 16, 1926

The order of the court overruling the demurrer to the defendant's answer herein and ordering judgment in favor of the defendant in this case, upon the said demurrer having been served on the defendant's attorneys on the 2nd day of January, 1926, and the plaintiffs having elected not to proceed to trial in said action.

It is ordered and adjudged that the complaint herein be, and the same is hereby dismissed without costs to either party.

Dated at Madison, Wisconsin, this 2nd day of January, 1926.

By the Court:

E. Ray Stevens, Judge.

[File endorsement omitted.]

[fols. 66-76] Application of Fox River Co. et al. omitted; printed side page 27 ante.

[fol. 77] BEFORE THE RAILROAD COMMISSION OF WISCONSIN

W. P.-228

In the Matter of the Application of THE FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON WOOLEN MILLS, THE APPLETON MACHINE COMPANY, THE VALLEY IRON WORKS, and THE APPLETON MANUFACTURING AND LUMBER COMPANY for Permission to Rebuild, Operate, and Maintain the So-called Middle Dam.

ORDER DISMISSING APPLICATION

On the 13th day of May, 1925, the petitioners above named, by their attorney, Moses Hooper, filed with the Railroad Commission of Wisconsin an application under Chapter 31 of the Statutes of Wisconsin for permission to rebuild and maintain the so-called Middle Dam at Appleton in and across the Fox River, extending from the head of Grand Chute Island in Section 35 south of the river, Town. 21 North of Range 17 East, of the Fourth Principal Meridian, to Lot 2 in Section 26, said Town and Range, north of the river.

The Commission examined the application and the two blue prints accompanying same, one being a map of the premises in which the dam is located, the other being entitled "Plans and Sections in two sheets. Sheet No. 2. Rebuilding of Middle Dam, in the City of Appleton, Wisconsin."

From an examination of the application and from other investigations hereinafter pointed out, the Commission finds:

That the application states the facts required to be stated under Section 31.13, except those required by subsection (b) thereof, namely, "If constructed by legislative permission, a statement of the act of the legislative authorizing the same." In fact, the application under Subdivision (e) affirmatively shows that the dam was built [fol. 78] without any legislative authority. It moreover appears from the records in the office of the Commission, as well as from an examination of the acts of the State Legislature of Wisconsin since the organization of the state that the dam in question was built without legislative per-

mission, was never legalized under Section 31.97 or under any other provisions of law, but that on the contrary it has existed since its construction and still exists as an illegal structure.

That the application does not state facts sufficient to give jurisdiction to the Commission to issue a permit to the applicant under Section 31.13 of the Statutes.

The Commission further finds that the application also states the facts required to be stated under Section 31.05 of the statutes for a permit to construct a dam, but does not comply with the further requirement of the statutes that each applicant for a permit under Section 31.05 of the statutes shall file with his application for a permit the proposals under Subdivisions (1), (2) and (3) of Section 31.09, in that the proposal required under Subsection (3) of Section 31.09 is omitted.

That the application does not comply with the requirements of the statutes so as to give jurisdiction to the Commission to issue a permit to construct a dam under Section 31.05 for the reason that the applicants have not fully complied with Subsection (3) of Section 31.09 of the Statutes.

The Commission further finds that it is without jurisdiction to entertain the application.

It is therefore ordered that the application be and the same is hereby dismissed without prejudice.

Dated at Madison, Wisconsin, this 15th day of May, 1925.

Railroad Commission of Wisconsin. Adolph Kanneberg, Lewis E. Gettle.

AK-gh.

[fol. 79] RAILROAD COMMISSION OF WISCONSIN

W. P.-228

In the Matter of the Application of THE FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LTD., THE APPLETON WOOLEN MILLS, THE APPLETON MACHINE COMPANY, THE VALLEY IRON WORKS, AND THE APPLETON MANUFACTURING AND LUMBER CO. for Permission to Rebuild, operate, and Maintain the So-called Middle Dam.

ADMISSION OF SERVICE

Due service of a certified copy of decision and order in the above-entitled matter is admitted this 18th day of May, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys.
Moses Hooper, of Counsel.

(Please sign and return by next mail.)

[fol. 80] BEFORE THE RAILROAD COMMISSION OF WISCONSIN

[Title omitted]

RENEWAL OF APPLICATION—Filed May 21, 1925

To the Honorable the Railroad Commission of Wisconsin:

Now come the applicants, by their attorneys and counsel, and renew the application filed with you on May 13, 1925, with the understanding that it is for a permit to operate and maintain an existing dam under Section 31.07 of the Statutes of Wisconsin.

May 20, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys for Applicants. Moses Hooper, of Counsel.

[File endorsement omitted.]

[fol. 81] BEFORE THE RAILROAD COMMISSION OF WISCONSIN

[Title omitted]

ORDER DISMISSING APPLICATION

On the 21st day of May, 1925, the petitioners above named appeared by their attorneys and counsel, represented by Mr. Dempsey, before the Railroad Commission of Wisconsin and filed a renewal of their application under their former petition filed with the Commission on May 13, 1925,

which renewal of their application is in words and figures as follows:

To the Honorable the Railroad Commission of Wisconsin:

Now come the applicants, by their attorneys and counsel, and renew the application filed with you on May 13, 1925, with the understanding that it is for a permit to operate and maintain an existing dam under Section 31.07 of the Statutes of Wisconsin.

May 20, 1925.

Bouck, Hilton, Kluwin & Dempsey, Attorneys for Applicants. Moses S. Hooper, of Counsel.

The Commission thereupon re-examined the application and finds and determines that the application states the facts required to be stated under section 31.07, Statutes, for an application for a permit to operate and maintain an existing dam which was constructed in or across a navigable stream without legislative authority, but that the application does not comply with the further requirements of [fol. 82] the statute that each applicant for such permit shall file with his application the proposals under subdivisions (1), (2) and (3) of section 31.09, in that the proposal required under subsection (3) of said section 31.09 is omitted therefrom.

Hence the Commission finds that it is without jurisdiction to entertain the application.

It is therefore ordered that the application be and the same is hereby dismissed without prejudice.

Dated at Madison, Wisconsin, this 25th day of May, 1925.

Railroad Commission of Wisconsin. Adolph Kanneberg, A. R. McDonald.

AK-b.

[fols. 83 & 84] Received Railroad Commission May 27, 1925.

Referred to Secretary's Office

RAILROAD COMMISSION OF WISCONSIN

W. P.-228

In the Matter of the Application of THE FOX RIVER PAPER CO., THE PATTON PAPER CO., LTD., THE APPLETON WOOLEN MILLS, THE APPLETON MACHINE CO., THE VALLEY IRON WORKS, and THE APPLETON MFG. AND LUMBER CO. for Permission to Rebuild, Operate, and Maintain the So-called Middle Dam

ADMISSION OF SERVICE

Due service of two certified copies of decision in the above-entitled matter is admitted this 26 day of May, 1925.

Bouch, Hilton, Kluwin & Dempsey, Attorneys for Applicant. Moses Hooper, of Counsel.

(Please sign and return by next mail.)

[fols. 85-89] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS

And because the foregoing return of the Railroad Commission of Wisconsin to the circuit court for Dane County in the above entitled action does not appear of record, I, the undersigned, the circuit judge who tried said action, have, on stipulation of the respective parties, settled and signed this Bill of Exceptions to the end that the same be made a part of the record herein, this 14th day of January, 1926.

E. Ray Stevens.

[fols. 90 & 91] IN SUPREME COURT OF WISCONSIN

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, Limited, The Appleton Machine Company, and The Appleton Manufacturing and Lumber Company, Appellants,

vs.

RAILROAD COMMISSION OF WISCONSIN, Respondent

Dane Circuit Court

JUDGMENT—April 6, 1926

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the Circuit Court of Dane County, in this case, be and the same is hereby affirmed.

Chief Justice Vinje and Justices Rosenberry and Eschweiler dissent.

Justice Stevens took no part.

[fol. 92] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

Appeal from a Judgment of the Circuit Court for Dane County

E. Ray Stevens, Circuit Judge

Affirmed

OPINION—Filed April 6, 1926

OWEN, J.:

This action was brought in the circuit court for Dane county to review an order of the Railroad Commission. On May 13, 1925, the plaintiff presented to the Railroad Com-

mission an application for a permit to operate and maintain an existing dam constructed without legislative authority across the Fox River in the city of Appleton. The application stated the facts required to be stated under sec. 31.07 Stats., but did not contain the proposal required to be stated by subsection 3 of sec. 31.09 Stats. This provision requires the consent on the part of the applicant "that the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property o fthe grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition o fall dams, works, buildings, or other structures or equipment, used and useful [fol. 93] under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation." Because the application for the permit did not contain this proposal or consent the Railroad Commission dismissed the application.

The complaint in this action prayed judgment "directing the said Railroad Commission to take jurisdiction of said application and fix a time and place for a public hearing thereon and proceed thereon to file a determination as provided by the statutes of Wisconsin.

The plaintiff claims that the provision of the statutes requiring the applicant to consent to the valuation prescribed by the statutes in the event that the property is taken over by the state or municipality at any time after the expiration of thirty years after the permit becomes effective, is unconstitutional, and that the Railroad Commission had no right to require such a consent as a condition precedent to its entertaining and considering the application. The lower court held the law constitutional and rendered judgment

in favor of defendant, from which judgment the plaintiff brings this appeal.

[fols. 94 & 95] OWEN, J.:

Mr. Justice Stevens presided at the trial of this case in the circuit court. He therefore did not participate in the consideration and decision of the case in this court. The members of the court participating are equally divided in opinion upon the question involved on this appeal. Mr. Chief Justice Vinje, Mr. Justice Rosenberry and Mr. Justice Eschweiler are of the opinion that the judgment appealed from should be reversed. Mr. Justice Doerfler, Mr. Justice Crownhart and the writer are of the opinion that the judgment should be affirmed. Under the established rule it follows that the judgment appealed from is affirmed. Racine Auto Tire Company v. Hansen, 173 Wis. 118.

By the Court: Judgment affirmed.

[fol. 96] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed July 17, 1926

To the clerk of said court:

Please take notice that the following is a statement of the points on which the plaintiffs in error intend to rely and a stipulation relating to the portions of the record to be printed.

Points to be Relied Upon

The points on which plaintiffs in error rely are that subdivision (3) of Section 31.09 of the Statutes of Wisconsin of 1925 is not in harmony with the Federal Constitution in this

First. That it violates that provision of Article V. of Amendments to the Federal Constitution which is in words following, to-wit: "Nor shall private property be taken for public use without just compensation."

Second. That it violates that provision of Article V. of the Amendments to the Federal Constitution which is in words following, to-wit: "No person shall be . . . deprived of life, liberty or property, without due process of law."

Third. That it violates that provision of Article XIV. of the Amendments to the Federal Constitution which is in words following, to-wit: "Nor shall any state deprive any [fol. 97] person of life, liberty or property without due process of law."

Stipulation as to Parts of Record to be Printed

It is hereby stipulated by and between the plaintiffs in error and the defendant in error by their respective attorneys that the following portions of the record, which counsel believe sufficient to show the errors complained of and to present to the court the questions arising in this proceeding, shall be printed

	Page of record
Writ of Error	1
Petition Therefor	4
Order Allowing Writ	7
Assignments of Error and Prayer	12
Complaint	24
Answer	40
Demurrer	45
Order overruling demurrer to defendant's answer	52
Judgment	57
Transcript of proceedings before Railroad Commission	64
Application of Fox River Paper Company et al	66
Order dismissing the Application	77
Renewal of Application	80
Order dismissing Application	81
Bill of Exceptions settled and signed by Circuit Judge	85
Judgment of Wisconsin Supreme Court	90
Opinion of Wisconsin Supreme Court	91

It is further stipulated and agreed that if any necessary part of the record be not thus printed, the plaintiffs in error [fols. 98 & 99] have the right to print and may be required

by the defendant in error to print any further or additional portions thereof.

Dated this 15th day of July, A. D. 1926.

John F. Kluwin, Attorney for Plaintiffs in Error. Moses Hooper, of Counsel. Herman L. Ekern, Attorney General; Suel O. Arnold, Asst. Atty. Gen., Attorneys for Defendant in Error.

[fol. 100] [File endorsement omitted.]

Endorsed on cover: File No. 32,059. Wisconsin Supreme Court. Term No. 492. Fox River Paper Company, Patten Paper Company, Limited, Appleton Woolen Mills, et al., plaintiffs in error, vs. Railroad Commission of Wisconsin. Filed July 6th, 1926. File No. 32,059.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 1926

No. 492

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, Limited, The Appleton Machine Company, and The Appleton Manufacturing and Lumber Company, Plaintiffs in Error,

vs.

RAILROAD COMMISSION OF WISCONSIN, Defendant in Error

STIPULATION AND ADDITION TO RECORD—Filed March 11, 1927

To the Clerk of said Court:

Please take notice that the plaintiffs in error and the defendant in error, by their respective attorneys, have entered into the following stipulation providing for printing of an additional portion of the record herein:

It is hereby stipulated by and between the plaintiffs in error and the defendant in error, by their respective attorneys, that in addition to the parts of the record to be printed as designated by stipulation between the respective attorneys of the parties hereto, made and entered into on or about the 15th day of July, A. D. 1926, and duly filed with the clerk of said Court, that there be forthwith printed by said clerk a supplement to the Transcript of Record in this case consisting of "Directions for Order Overruling Demurrer to Answer", found on page 47 of the record; all costs and charges incident to said printing to be borne by the plaintiffs in error.

Dated March 8, 1927.

John F. Kleem, Edward J. Dempsey, Attorneys for Plaintiffs in Error. Moses Hooper, of Counsel. John W. Reynolds, John W. Reynolds, Atty. Gen., Sml. O. Arnold, Asst. Atty. Gen., Attorneys for Defendant in Error.

In Circuit Court of Dane County

Fox River Paper Company, The Patten Paper Company, Limited, The Appleton Machine Company, and The Appleton Manufacturing and Lumber Company, Plaintiffs,

vs.

Railroad Commission of Wisconsin, Defendant

Directions for Order Overruling Demurrer to Answer—Filed in Circuit Court December 12, 1925; in Supreme Court January 16, 1926

By the Court:

The case presents a single issue of constitutionality of subdivision (3) of section 31.08 of the statutes,—the so-called recapture clause of the present water power act.

The consideration of this question can be approached in the light of fundamental rules of law that are so well established that they are not questioned by any party to this action. On the one hand it is conceded that the right of the riparian owner to use the water of the river on his own land for the purpose of creating power is a private right appurtenant to the riparian land, that such right is private property which cannot be taken from the owner without the payment of just compensation based upon the value of the waterpower at the time such property is taken.

On the other hand it is conceded that all right on the part of the reparian owner to use the water of a navigable stream for the purpose of developing power must be exercised in subordination to the paramount rights of the public in and to the water of such navigable stream and that no riparian owner may construct a dam in any navigable stream until the state has given its permission.

In consenting or in refusing to consent to the erection of such a dam the state is exercising one of its sovereign functions that of protecting the interests of the public in the navigable waters of the state. Riparian owners take title to their lands with notice of the fact that all navigable waters and the title to all land under navigable waters of Wisconsin are held in trust by the state for the benefit of

all the people as a whole. "The state has the power, as such trustee for the public, to so regulate these public uses of navigable waters as to best accomplish and promote the public interests." Merwin v. Houghton, 146 Wis. 398, 409. The right of riparian owners to use the waters of navigable streams are in strict subordination to these rights of the public. Their right to build dams and to develop water powers on their lands are inchoate until the state has given its consent that a dam may be built in a navigable stream by the riparian owner for the purpose of developing water power. It is the combination of riparian ownership and of this grant by the state that creates the water power.

In granting or refusing to grant the right to build a dam in a navigable stream the state or the legislature, that acts for the people of the state, is exercising the sovereign power of determining whether a navigable stream may be obstructed or changed and, if so, whether such obstruction improves or interferes with navigation. It may grant or refuse to grant the right to construct the dam and no other department of government may control the exercise of that power vested in the legislature. If the legislature refuses to grant the requested franchise for a dam the riparian owner has been denied no constitutional right. The riparian owner must submit. He has no redress, because his rights are subordinate to those of the public. The right to build any structure in the navigable waters of Wisconsin "is subordinate to the public use, and may be regulated or prohibited by law." Cohn v. Wausau Boom Co., 47 Wis. 314, 322.

If the legislature may wholly refuse permission to erect a dam or other structure in the navigable waters of the state, it follows that it may grant such permission upon such terms as it shall determine will best protect the interests of the public. The legislature could impose the condition that the dam should be removed when it obstructed navigation or that it should be removed at the end of a definite period of time, for example, thirty years. The present law does not impose any such hardship upon the riparian owner. It permits him to construct and enjoy his dam for at least thirty years and then instead of compelling him to stand the loss and to bear the expense incident to the removal

of the dam, it secures repayment to him of a sum which is a reasonable equivalent to his total investment in the dam, in case he is not permitted to continue the use of the water power created by the erection of the dam.

The same fundamental rules of law apply to this case where the Commission has refused to grant the required permit, that apply when the legislature acts directly, instead of through the medium of the Railroad Commission. In either case the permit granted is a franchise in that it grants to a citizen the power to exercise a sovereign right which does not belong to citizens generally, of common right,—that of improving the navigation of a stream which is forever dedicated to the use of the public as a whole. Our court has held that a permit to construct a dam granted by legislative enactment was a franchise. State ex rel. Attorney General v. Norcross, 132 Wis. 534, 548. The nature of the permit is not changed by the fact that in granting the franchise the state has made use of the instrumentality of the Railroad Commission or of some local municipal governmental unit, like a city council. In either case the permit is a franchise in which the state may impose such conditions as it shall deem reasonably necessary to protect the interests of the public. The imposition of such terms do not constitute a taking of the property of the riparian owner by the exercise of eminent domain.

The law here in question does not apply to any existing structure which has been lawfully placed in the navigable waters of Wisconsin. Like the Workman's Compensation Act, this is an elective act, in the sense that it does not apply to any water power as to which the riparian owner does not elect to come under the act by making application for the permit or franchise provided for by the act. This fact distinguishes the law here under consideration from that held unconstitutional in the Water Power Cases, 148 Wis. 124. The act there under consideration applied to existing plans built after the granting of the proper franchise, and attempted to take such private property without just compensation.

When a riparian owner takes title to his property with knowledge that all incorporeal riparian rights and all rights of the riparian owner in and to the bed of the stream are

subject to and subordinate to the power of the state to impose such conditions as it deems necessary to protect the interests of the public in the navigable waters within its borders, the property of the riparian owner is not taken without just compensation or without due process of law merely because he elects not to accept the conditions which the state imposes when it grants the franchise, without which the riparian owner has no right to obstruct the flow of any navigable stream by the erection of a dam. The state in no way interferes with the use which the riparian owner seeks to make of his land and his riparian rights until the riparian owner seeks to interfere with the rights of the public in the navigable waters of the state. When the owner asks this franchise he must comply with the conditions which the sovereign power imposes. In so doing the state is not taking the property of the riparian owner by preventing his lawful use of the same, because no such use is lawful until the state grants a franchise for the building of a dam to develop such water power, "even though the same may prove * * * to be a benefit instead of an injury to the navigation" of the stream. Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61, 67.

The attorney general may prepare the proper order overruling the demurrer to the answer, submitting the same to opposing counsel before it is presented for signature.

Dated December 12, 1925.

Grace D. Meyers, Official Reporter.